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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMY HARO,

Defendant and Appellant.

2d Crim. No. B268143
(Super. Ct. No. KA056067-01)
(Los Angeles County)

OPINION FOLLOWING
REHEARING

Tommy Haro appeals an order denying his petition for resentencing under Proposition 36, the Three Strikes Reform Act of 2012 (the Act). (Pen. Code, § 1170.126.)¹ We conclude, among other things, that the trial court did not err by denying his petition because he was armed with a firearm during the commission of his 2002 offense of possession of a firearm by a felon. (Former § 12021, subd. (a)(1).) We affirm.

¹ All statutory references are to the Penal Code.

FACTS

On February 21, 2002, Police Officer Juan Mata conducted a parole search at a residence. The person “subject to the search” was a woman named Patricia. Mata searched the house, went to the garage four or five feet from the house, and conducted a pat-down search of Haro, a felon. Mata opened a cabinet in the garage and discovered an object wrapped in a blue towel shaped like a rifle. He unraveled the towel and discovered a blue bandana. He unwrapped the bandana and found a Mosburg 12-gauge shotgun. He “observed men’s clothing inside the cabinet and concluded [Haro] was the sole occupant of the garage.”

Haro filed a motion to suppress. He claimed “he had an expectation of privacy in the garage because it was his living quarters [and] he had exclusive control of the cabinet where the shotgun was recovered” The trial court denied the motion.

After a bench trial, Haro was found guilty of possession of a firearm by a felon (Former § 12021, subd. (a)(1)) (count 1) and other offenses. Because of his conviction on count 1, he fell within the purview of the three strikes law and was sentenced to an indeterminate 25-years-to-life term. We affirmed the conviction.

In 2012, Haro filed a “petition for recall of sentence.” He claimed, among other things, that his 2002 conviction for possession of a firearm by a felon qualified for resentencing under section 1170.126 .

The trial court denied the petition. It said, “[B]ased on the record . . . [Haro] was armed with a firearm when he committed [the offense].”

DISCUSSION

The Act (§ 1170.126) changed “the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor.” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1026.) “In all other cases, the recidivist will be sentenced as a second strike offender.” (*Ibid.*) “The Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled” (*Ibid.*)

Standard of Proof

Haro contends the trial court erred by making findings on his eligibility for resentencing using the wrong standard--preponderance of the evidence.

The People claim Haro has not presented a sufficient record on this issue. Nor did Haro raise this issue in the trial court. The record is silent on the standard the court applied. We cannot presume error on an incomplete, undeveloped or silent record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) Even assuming the court used the preponderance of the evidence standard, the result does not change.

In *People v. Osuna, supra*, 225 Cal.App.4th at page 1040, the court held that “[b]ecause a determination of eligibility under section 1170.126 does not implicate the Sixth Amendment, a trial court need only find the existence of a disqualifying factor by a preponderance of the evidence.”

Haro notes that in *People v. Arevalo* (2016) 244 Cal.App.4th 836, 853, the appellate court held the applicable standard in determining eligibility in resentencing cases is proof beyond a reasonable doubt. But in reaching this conclusion, the court acknowledged that it was departing from prior cases that held the preponderance of the evidence standard applies.

The People suggest *Arevalo*'s discussion of the standard of proof is dicta because the court reversed the order denying resentencing for another reason. At resentencing, the trial court found Arevalo was armed when he committed his offenses. But at trial he was acquitted of the felon in possession of a firearm charge, and an arming enhancement allegation was found not to be true. The Court of Appeal said, "Arevalo's acquittal on the weapon possession charge and the not-true finding on the allegation of being armed with a firearm, preclude a finding that he is ineligible for resentencing consideration." (*People v. Arevalo, supra*, 244 Cal.App.4th at p. 853.) After determining that the order had to be reversed, the court said, "The matter is remanded for a hearing to determine whether, *under a preponderance of the evidence standard*, Arevalo would pose an unreasonable risk of danger to public safety such that he should not be resentenced." (*Id.* at p. 854, italics added.)

We agree with the majority of courts that hold the preponderance of the evidence standard is the correct one for deciding eligibility for resentencing. (*People v. Frierson* (2016) 1 Cal.App.5th 788, 793-794; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1060-1062; *People v. Osuna, supra*, 225 Cal.App.4th at p. 1040.)

Resentencing Court's Reliance On the Trial Record

Haro contends the trial court erred by making “its own factual finding that [he] was armed during the commission of the offense” by relying on portions of the “trial record provided by the District Attorney.”

The People contend that at resentencing the trial court “[p]roperly [e]xamined the [r]ecord of [c]onviction.” (Boldface omitted.) They claim it properly reviewed transcripts of the trial testimony and the appellate opinion which affirmed Haro’s conviction “to determine whether [Haro] was armed with a firearm.” We agree.

“The factual determination[s] of whether the felon-in-possession offense was committed under circumstances that disqualify defendant from resentencing” are made “by the court based on the record of conviction.” (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286.) “[T]he appellate opinion is part of the record of conviction.” (*Ibid.*)

Haro contends the trial court improperly and independently relitigated his case to decide his ineligibility for resentencing. But, as the People note, in making its findings on eligibility, the trial court did not go outside the record. The district attorney requested the court to decide his ineligibility for resentencing based on the trial transcripts and the facts in our appellate opinion which affirmed his conviction. The trial court said, “[B]ased on the record . . . , [Haro] was armed with a firearm when he committed [the offense].” Haro has not shown this finding was not derived from the trial record or is inconsistent with the facts in the appellate decision. (*People v. Haro* (Sept. 24, 2003, B162005) [nonpub. opn.].)

Armed With a Firearm

Haro contends the trial court erred in finding that he was armed with a firearm. We disagree.

“[A]n inmate is disqualified from resentencing if . . . ‘[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.’” (*People v. Osuna, supra*, 225 Cal.App.4th at p. 1029.) “[A]rmed with a firearm’ has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively.” (*Ibid.*)

Haro claims having a firearm available for use during his unlawful possession of a firearm offense (former § 12021) does not render him ineligible for resentencing. Appellate courts have rejected this contention. In *Osuna*, the court said the Act “disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm.” (*People v. Osuna, supra*, 225 Cal.App.4th at p. 1032.) “[A] defendant is armed with a weapon even though it is not carried on his person, when he is aware it is hidden in a place readily accessible to him.” (*People v. White* (2016) 243 Cal.App.4th 1354, 1362.) Such places may include a shelf or a bedroom in a residence. (*Ibid.*)

As the People note here, evidence in the trial record shows Haro hid the gun in his residence. In our decision affirming his conviction, we said Haro claimed “he had an expectation of privacy in the garage because it was his living quarters [and] he had exclusive control of the cabinet where the shotgun was recovered” The trial record also shows that he was in the garage at the time of the search. The weapon was

“hidden in a place readily accessible to him.” (*People v. White, supra*, 243 Cal.App.4th at p. 1362.)

In a petition for rehearing, Haro claims we should not have cited language from our prior appellate opinion about facts he stated in an unsuccessful motion to suppress evidence. But that is part of the case history. Moreover, as already mentioned, the trial court’s findings also are supported by additional facts in the trial court record.

We have reviewed Haro’s remaining contentions and we conclude he has not shown grounds for reversal.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

William C. Ryan, Judge

Superior Court County of Los Angeles

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